In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FRED RASMUSSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF FACTS.

December 12, 1902, Fred Rasmussen was found guilty of charges made in an indictment for violating section 127 of the Alaska Code (30 Stats. at Large, 1272), which provides:

> SEC. 127. That if any person shall keep or set up a house of ill fame, brothel, or bawdy-house for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than one hundred nor more than five hundred dollars.

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In accordance with section 171 of the Alaska Code (31 Stats. at Large, 358), the jury consisted of six men.

Plaintiff in error assigns the following errors in bringing this appeal:

1. The court erred in compelling appellant, over his protest and objection, to be tried with a jury of six men instead of by a jury of twelve men.

2. The court erred in instructing the jury as follows: That one may commit this offense without being himself present, or even knowing of any one particular act of this sort occurring in his house, if he knew this sort of thing was going on and knowingly permitted it, though he knew of no positive single act, he is guilty of the offense here charged.

3. The court erred in instructing the jury that before returning a verdict in this cause, that they must be certain beyond a reasonable doubt that the defendant, at the time stated in the indictment, was the keeper of the place indicated in the indictment. The person who aids in conducting a place of the character named in the indictment as manager, or other controlling character, is a keeper within the allegations of the indictment.

ARGUMENT.

Plaintiff in error in his brief says he relies chiefly upon his first assignment of error, which raises the question whether Congress has the power to provide for trials for misdemeanors by juries of less than twelve persons.

Whether or not Rasmussen shall be punished for the offense for which he was convicted, which is of great

importance to the people of Alaska, is nevertheless of small consequence compared with the broader question involved in the adjudication of this case.

The Government contends that all the provisions of the Constitution were not extended to Alaska by article 3 of the treaty of session, by section 1891 of the Revised Statutes, or by any subsequent legislation. The Government expects to establish the proposition that Alaska is not an organized Territory within the meaning of section 1891, as that section is understood by Congress, and as it has been construed, by implication at least, by this court; and that, therefore, Congress in legislating for the Territory is restricted only by such provisions and limitations of the Constitution as are applicable and fundamental.

Plaintiff in error relies solely upon *Thompson* v. *State of Utah* (170 U. S., 343), and cases cited therein, to sustain his contention that section 171 of the Alaska Code, providing "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," is in violation of section 2, article 3, of the Constitution of the United States and of the sixth amendment of the Constitution. That case involved a point very different from that here contended for. The following language of the court in that case shows the principal point decided:

> * * * the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed

within the limits of the State while it was a Territory without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any State of an *ex post facto law*.

* * * * *

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?

* * * * *

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because in respect of such crimes the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury. (Pp. 346, 350, 355.)

Section 17 of the act establishing a Territorial government for Utah (9 Stat. L., p. 458) provides, "That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." No such extension of the Constitution has been made to Alaska. The

remarks of the court quoted on pages 5 and 10 of plaintiff's brief were therefore made in a case not analogous to the one now before the court. (*Am. Pub. Co.* v. *Fisher*, 166 U. S., 467.)

The cases of *Hawaii* v. *Mankichi* (190 U. S., 197) and *Dorr & O'Brien* v. *United States* (May 31, 1904) are directly in point with the question now presented. They are decisive that it is not unconstitutional for Congress to pass an act authorizing a trial in a criminal case by a jury of less than twelve men, for Territories, under certain conditions. In the former case Congress expressly affirmed conviction by nine jurymen, when it said: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine," and impliedly affirmed conviction without trial by jury in the Philippine Islands. Mankichi brought petition for *habeas corpus*, on the ground that a conviction by nine of twelve jurors in an Hawaiian court was in violation of articles 5 and 6, amendments of the Constitution. The court in arriving at the conclusion that said sections of the Constitution did not apply, said:

> If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly

> requires, amendment 5, that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" and, amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body?
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> * * * * * * * But we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being (pp. 212, 218).

In their concurring opinion Justices White and McKenna say:

> The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them (p. 220).

In the Dorr and O'Brien case the court said:

> This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine

Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands.

* * * * *

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

* * * * *

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress in framing laws for outlying territory belonging to the United States was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a

> method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept in advance of incorporation into the United States a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the Territories, to hamper its exercise with this condition.
>
> We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, paragraph 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

The status of Alaska is not materially different from that of the Philippine Islands and Hawaii at the time the question in the Mankichi case arose. The facts in this case are much more favorable to the conclusion that the sections of the Constitution do not apply than they were in the latter case. Neither the treaty nor subsequent laws of Congress have "incorporated Alaska into the United States." Much stronger expressions than those quoted on page 11 of brief of plaintiff in error, taken from the Alaskan Code, and article 3 of

the treaty of cession, were used in the Newlands resolution.

Article 3 of the treaty of cession with Russia provided:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country. (15 Stats., 542.)

This article was intended to extend, and no doubt did extend, to the civilized inhabitants of the Territory certain fundamental attributes and privileges of American citizenship, but it will hardly be contended that it was thereby intended to extend all the provisions of the Constitution to this barren and desolate region, peopled as it was by savages and an alien race, wholly out of sympathy with our customs and institutions.

Mr. Justice Brown in the case of *Downes* v. *Bidwell* (182 U. S., 280) referred to the provisions in article 3 of this treaty of cession in these significant words:

> In all its treaties hitherto the treaty-making power has made special provision for this subject; * * * in the case of Alaska, that the inhabitants who remained three years, "with

> the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc. * * * In all of these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

In the *Dorr & O'Brien case* (*supra*) this court held that the right of trial by jury is not a fundamental right. This ruling makes it clear that there is nothing in the third article of the treaty of cession which in any way militates against the contentions of the Government in this case

The next year after Alaska was acquired, Congress provided for the nationalization of all vessels owned by residents of the Territory and also extended the customs laws to the Territory. No further legislation affecting the Territory was enacted, except some minor legislation regulating the killing of fur seals, until 1884, when an act was passed "providing a civil government for Alaska." In that act (23 Stats., 24) Congress provided that "the territory ceded to the United States by Russia by the treaty of March 30,1867, and known as Alaska, shall constitute a civil and judicial district," etc. In all other acts which I have examined organizing Territories they have been referred to as *Territories* and not as *districts.*

In section 2 of this act a governor is provided for, and it is provided further that "he shall perform generally in and over said district such acts as pertain to the office of governor of a Territory, so far as the same may be made or become applicable thereto. He

shall make an annual report * * * of the condition of the said district," etc.

Section 9 *inter alia* provides, "That all officers appointed for said district, before entering upon the duties of their offices, shall take the oaths required by law; and the laws of the United States not locally inapplicable to said district and not inconsistent with the provisions of this act are hereby extended thereto; but there shall be no legislative assembly in said district, nor shall any delegate be sent to Congress therefrom."

Section 14 *inter alia* "That the provisions of chapter 3, title 23 of the Revised Statutes of the United States relating to the unorganized Territory of Alaska, shall remain in full force, except as herein specially otherwise provided."

In the criminal code for Alaska passed March 3, 1899, entitled "An act to define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said District" (30 Stats., 1253), Congress was careful to preserve the distinction theretofore made and to refer to Alaska as a district and not as a territory.

On June 6, 1900, an act was passed "Making further provision for a civil government for Alaska, and for other purposes." (31 Stats., 321.) Congress, however, was careful to provide in section 1 of title 1, "That the territory ceded to the United States by Russia by the treaty of March 30, 1867, and known as Alaska, shall constitute a civil and judicial district."

Plaintiff in error at page 12 of his brief refers to section 367 of title 3 of this act, which is found at page 552, 31 Stats., and is as follows:

> SEC. 367. So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the district of Alaska.

It is needless to discuss the provisions of this section, since section 171 of title 1 of the same code (p. 358) provides for trials of misdemeanors by a jury of six, which right was expressly reserved by the section just quoted.

Section 1891 of the Revised Statutes provides:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Now, what is an organized territory as understood by Congress and as defined by this court? The Standard Dictionary, volume 2, page 1861, defines a Territory as—

> A division of the national domain of the United States that, by act of Congress, has been organized under a separate government in the expectation that it, or some part thereof, will ultimately be admitted into the Union as a State; as, Arizona is a Territory.
>
> An organized Territory has a government

> similar in many respects to that of a State, but its political entity is wholly under the authority of the Federal Government.

The Century Dictionary and Encyclopædia, volume 8, page 6248, says that a Territory is—

> In the United States an organized division of the country not admitted to the complete rights of statehood. Its government is conducted by a governor, judges, and other officers appointed from Washington, aided by a *Territorial legislature*. Each Territory sends one Delegate to Congress, who has a voice on Territorial matters, but can not vote. * * * There are now (1898) three organized Territories, New Mexico, Arizona, and Oklahoma, and there are also two unorganized Territories, the Indian Territory and Alaska.

A critical examination of chapter 1, title 23 of the Revised Statutes, covering the Territories, and including section 1891, shows that Congress has considered a legislative assembly and a delegate necessary to complete organization within the meaning of that section. Section 1846 provides *inter alia* that "legislative power in each Territory shall be vested in the governor and a legislative assembly." Here Congress did not mean each Territory whether organized or unorganized, but that each organized Territory should have a legislative assembly. Section 1851 provides that "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. * * *"

Section 1862 provides *inter alia* "That every Territory shall have the right to send a Delegate to the House of Representatives of the United States to serve during each Congress who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof." Congress did not here mean that every Territory whether organized or not should be entitled to a delegate, but that every organized Territory should be entitled to a delegate. This section shows clearly that Congress regarded the right of representation in Congress as essential to all organized Territories, for in the following section (1863) providing for the time, places, and manner of holding elections for delegates, it is provided, "that at all subsequent elections therein, as well as at all elections for a Delegate in *organized Territories*, such time, places, and manner of holding the election shall be prescribed by the law of each Territory." Section 1885 provides that "The legislative assembly of every Territory hereafter organized shall hold its first session," etc.

It is clear, then, that Congress in this chapter regarded all Territories not having an autonomous local government as unorganized within the meaning of section 1891, extending the Constitution and all laws of the United States which are not locally inapplicable to all the organized Territories and Territories thereafter to be organized.

This view is much strengthened when we remember that in the first act providing a civil government for

Alaska Congress was careful, as heretofore pointed out, to provide that Alaska should not have a legislative assembly and should not be entitled to a Delegate in Congress.

In 1886 Congress passed "An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes" (24 Stats., 170), the first section of which provided "That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases," etc.

Section 2 provided "That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company," etc.

Section 4 provided "That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted," as therein stated.

It is evident that Congress in this act was simply amplifying the provisions of chapter 1, title 23, of the Revised Statutes, and that a local government was still considered essential to the organization contemplated by section 1891.

Whether or not Alaska was completely organized within the purview of section 1891 was not in issue and was not touched upon by this court in either the *Coquitlam case* (163 U. S., 346) or in the *Binns case*

(194 U. S., 486). It was not necessary that it should be a completely organized Territory to be included in the act of 1891, referred to in the Coquitlam case. The question was whether or not it was a Territory as the word is used in that act, and the court held it was. In effect the *Binns case* holds that Congress may provide for the collection of certain license taxes in a given Territory if the purpose of such taxes is to provide revenue for the enforcement of the laws enacted for such Territory; that is, if the benefit is to inure to the Territory. That Alaska is a partially organized Territory for which certain special legislation has been enacted by Congress, can not be denied; but it is nevertheless earnestly contended that there is still lacking the most important attributes of complete organization, the organization contemplated by Congress in enacting section 1891, viz, local self-government through the medium of a Territorial legislature and the right of representation in Congress through a Territorial Delegate elected by the people of the Territory.

Moreover this court, in the case of *In re Lane* (135 U. S., 443), adopted the understanding of Congress as to what constituted an organized Territory. In that case Lane had been prosecuted in the district of Kansas for an offense committed in that part of the Indian Territory then known as Oklahoma. Petition for a writ of habeas corpus was prayed out on the ground, among others, that the trial court had no jurisdiction, because the offense was committed in a Territory of the

United States. The statute under which he was tried (25 Stat., 658) provided that whoever committed the offense denounced—

> * * * in the District of Columbia or other place except the Territories, over which the United States has exclusive jurisdiction; or on any vessel within the admiralty or maritime jurisdiction of the United States, and out of the jurisdiction of any State or Territory, shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years, and for each subsequent offense not more than thirty years.

This court discharged the rule. Mr. Justice Miller, in the opinion, said:

> * * * But we think the words "except the Territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower House of that body, except what are called Delegates, with limited functions. Yet they exercise nearly

> all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them. It is this class of governments, long known by the name of Territories, that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.
>
> Oklahoma was not of this class of Territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits, as the Territories of the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound (pp. 447, 448).

Similar offenses committed in Alaska would then have been prosecuted under the provisions of this law, notwithstanding that the act of May 17, 1884, "providing a civil government for Alaska" was in force. Congress has been very careful not to change the status of Alaska since that time. It has never had any local government, and Congress is still the only law-making body for the Territory. The governor is simply the agent of Congress.

Section 1891 must be construed with reference to the other provisions in that chapter, for, as said by Mr. Justice Brown in the *Mankichi case* (190 U. S., 212), "there is another question underlying this and all other rules for the interpretation of statutes, and that is what was the intention of the legislative body." Con-

gress has made it very plain that it has never considered Alaska within the provisions of section 1891.

There is far greater reason for withholding the provisions of the Constitution from what is practically a great mining camp, peopled by a heterogeneous and migratory class from whom all power of local government has been, with good reason, withheld by Congress, than there is in withholding the Constitution from a Territory that has advanced to that stage where Congress may with safety extend the privileges of self-government. Where local self-government has been extended the Territory is to all intents and purposes, as was said by Freeman in his American Lectures (p. 351), "an infant State." All its domestic and municipal concerns are controlled by its own legislative body. All questions of local taxation are passed upon and settled by that body. There would be very cogent reasons why Congress, having completely organized a Territory and having delegated legislative powers thereto, would want the Constitution extended as the chart and compass by which the local legislature would be guided. In fact that is precisely what Congress has done in every instance where it has completely organized a Territory.

Plaintiff in error has abandoned his second assignment of error, and thereby eliminated it from further consideration.

An ingenious arrangement of statements regarding the court's charge to the jury, erroneous conclusions regarding the charge, and incorrect quotation of the law characterize the third assignment of error.

The law provides:

> That if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine of not less than $100 nor more than $500. (30 Stats. at Large, 1272.)

According to the version of plaintiff in error, a person must both "keep and set up" a house of ill fame to be guilty of this offense. According to the statute, however, it is not necessary that a person "set up" such a house, but if he "keeps" it, he is guilty of this offense and the indictment so charges.

The quotation on page 12 of the brief of the plaintiff in error, purporting to be taken from the charge of the judge, is not found in the copy of the charge certified by the clerk of the United States district court, filed with the clerk of this court, a copy of which is set forth in an appendix to this brief. Neither is the substance of that quotation or of the third assignment of error found in the charge. But the contrary thereof is clearly stated in the last two paragraphs of the charge. A discussion of the charge as alleged by the plaintiff in error is deemed unnecessary.

Respectfully submitted.

CHARLES H. ROBB,
Assistant Attorney-General.

APPENDIX.

United States v. Fred Rasmussen.

GENTLEMEN OF THE JURY:

The section under which this indictment is brought by the grand jury reads as follows:

> That if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine of not less than one hundred nor more than five hundred dollars.

The following section provides—

> That in all prosecutions for the crime defined in the section last preceding, common fame shall be competent evidence in support of the indictment.

A bawdyhouse and a house of ill fame are synonymous terms, meaning one and the same thing. A bawdyhouse is any place, whether of habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes.

A house of ill fame is another name for the same thing.

The offense, therefore, that is charged here is not committing the offense of bawdy or illicit commerce between the sexes, but of keeping a house where this

sort of thing is permitted and carried on. The keeper may be a man or woman, and a married woman may be indicted for the offense, either alone or with her husband.

Keeping the house [does] not necessarily import property, but may signify that share of government which the wife has in the family as well as the husband. Although a statute has authorized the wife to own property and carry on business separately from her husband, and though she keep a bawdyhouse as her own venture and for her separate profit, if the husband knowing this lives with her and does not by his marital power restrain her, he is indictable also as the keeper.

The gist of this offense appears to consist in the allurement which the place holds out to a miscellaneous and common bawdry, corrupting to the public morals. The offense is not committed by permitting in a house a single illicit act, or by being a woman, even a prostitute, living in a bawdyhouse, or by a loose woman simply dwelling alone and having her daughters with her.

A bawdyhouse may consist of no more than a single room in a dwelling house, or it may be a tent, or a boat on a river; not even need the place be used for a dwelling or place of habitation.

Our statute provides that the offense of keeping a bawdyhouse is shown by proving its general or common reputation, together with other evidence. And why is this true? It is a place that is known to be open to all comers, of all sorts of characters, for illicit intercourse between the sexes. It is this general reputation which allures people to the place. It is its public notoriety that largely makes it an offense against decency and public morals.

Gentlemen, you have heard all the testimony in this case. You have heard the statements of witnesses as to this place being a bawdyhouse. From what I have already stated, you will understand that a place may be a saloon; it may be a dance house; it may be a theater; it may be a place where cigars and liquors are sold, and it may be at the same time a bawdyhouse.

A person who leases and lets rooms in a place for purposes of this character, knowing what is going on in the house, is the keeper of a bawdyhouse. If he lets a single room in his house for illicit purposes of this kind, he is the keeper of a bawdyhouse for all the purposes of this prostitution [prosecution]. The fact that he leases rooms to people in no wise lessens his offense, although they conduct their rooms to please themselves. The law is that if he leases and lets them, knowing that they are used for the purposes prohibited by the statute, he is as much the keeper of a bawdyhouse as though he has personal control of each and every person in it.

A person who knowingly suffers mere lodgers or other inmates of his house to use it as a brothel, keeps, in law, however the outward facts may appear, a bawdyhouse.

One may commit this offense without being themselves present at all, or even knowing of the fact of any one particular act of this sort occurring in his house. If he knows that if this sort of thing is going on, and knowingly permits it, though he know of no positive single act, he is guilty of the offense here charged.

I believe I have stated to you already that it is not one act of this kind committed in a house that constitutes it a bawdyhouse. Persons may go into a

hotel, rent their room, and commit this act without the knowledge or even thought of their being there for that purpose. Even if several people should do this at different times, it might not constitute the place a bawdyhouse; but if people go there, and the proprietor knows that they are there for that purpose, and he knows their reputation in the community where he lives, and the purposes for which they come together, and he permits them to live in his rooms for that purpose, he is the keeper of a bawdyhouse. If he continues to let even a single room in his house for these purposes and knows of their going on in his house, he is in law the keeper of a bawdyhouse. Proof of the offense charged in the indictment as to the character of the place may be made by showing the common repute of the place as a bawdyhouse or house of ill fame, together with proof of the gathering there habitually of persons of ill repute and evil fame for prostitution. When men and women indulge in lewd conduct, obscene language, profane language, and the like, and engage in dancing, drinking, and sending drinks to upper story, and like conduct, if you are not satisfied from this character of proof beyond a reasonable doubt that the place named in the indictment was a place of prostitution, and you are further satisfied from the evidence beyond a reasonable doubt that the defendant was the keeper of such place as explained in these instructions, you should find the defendant guilty as charged in the indictment.

You are further instructed that if you find the house or place described in the indictment was a bawdyhouse or house of ill fame, and was kept by the defendant, then you may infer, and the law infers, that it was kept and set up for the purposes of prostitution.

It has been testified that Mr. Kyrage holds the license for this place. You will remember his testimony upon the proposition of his connection with the place; that he had no interest in its management; that he simply was there for the purpose of selling beer. Whatever his testimony is on these matters, you will remember it. It is sufficient for me to say that he is not on trial for this offense. You are here to try the defendant upon the crime charged in the indictment as every other offense is tried, from all the testimony in this case, as given here in court.

But a man must not close his eyes. He must not close his mind from the knowledge that is common to all humanity. When a man says to you he is a keeper of a dance house, what does he mean? If a man testified to you that people in a dance house indulge in lascivious conduct toward each other, what do you understand that to mean? And when he further testifies that these people who are dancing together separate, and the women go upstairs and the men shortly follow them, what, from your knowledge of the world and the experience and judgment of men generally, is their purpose? From the facts stated you are to determine what is meant, and not take the naked wordst hemselves. You are to understand all the words imply, as in other affairs.

This defendant, like any other, should not be convicted of the offense charged unless he is found to be guilty by evidence that convinces your mind beyond a reasonable doubt. There should be no halfway measures about it. If he is not guilty under the evidence before you and the law as I give it, say so by your verdict. If he is guilty, you should so find.

And this defendant must not be convicted on the weight or preponderance of the evidence as in civil

cases. Every reasonable doubt as to the guilt of the accused must be removed from your mind before you can find him guilty. But you are not permitted to go to your jury room and raise imaginary doubts as to the guilt of the accused. Reasonable doubt does not mean any sort of doubt; but you are to think about the testimony in the case as honest, earnest men desiring to do your duty, and to act as you would in passing upon the graver affairs of life. The doubt, in order to be resolved in favor of the defendant, must be reasonable. Absolute certainty in the proof of crime is rarely attainable and never required.

Let me say to you further that every man accused of the commission of a crime is entitled to the presumption of innocence, which presumption is to go with him throughout the trial of the case, and control in your considerations, until it is overcome by evidence that convinces you of the guilt of the accused beyond a reasonable doubt.

You are the judges of the credibility of witnesses and the weight to be given to the testimony of each and all of them. You are to recall the testimony that has been given on the stand for yourselves. You are not to take statements as to the evidence that has been given from either court or counsel. If I state anything as to evidence that has been given it is for the purpose of aiding you in your understanding of the law of the case, and not for the purpose of giving my view of the evidence; neither are you to consider statements of counsel as conclusive as to the evidence that has been given. Recall for yourselves the evidence as given to you from the witness stand, and the law as I have given it to you, and let that alone control you in the verdict you render in every case.

The jury are instructed that, before you will be

justified in finding a verdict of guilty against the defendant, you must be satisfied by the evidence in the case, beyond a reasonable doubt, that the defendant, Fred Rasmussen, was the keeper of a bawdyhouse, in manner and form as charged in the information; and it is incumbent to establish that fact, by affirmative proof, beyond a reasonable doubt.

I instruct that under the law "common report" is competent evidence for you to consider in connection with the other evidence in the case as to the kind of a house—is the one in question—but as to whether the defendant was the actual keeper of said house can not be proven by reputation. You must be satisfied by other proofs, beyond a reasonable doubt, that he was the keeper before you can find him guilty.

General reputation is competent as bearing upon its character, yet there must be some testimony of its actual use as a house of ill fame.

You are instructed that by the term "keeper" as used in this connection is meant the person in charge and control of the house in question, and having the management of such, as distinguished from the other inmates thereof.

You are further instructed that although you should find from the evidence in this case that the defendant, Fred Rasmussen, was an inmate of the house in question, and although you should find that said house was a house of prostitution, unless you further find from the evidence, beyond a reasonable doubt, that he was the keeper of the same your verdict should be "Not guilty."

(Endorsed:) 336–B. In U. S. dist. court, United States *vs.* Fred Rasmussen. Instructions to jury filed Dec. 12, 1902. W. J. Hills, clerk. U. S. atty. Atty. for ptff.

UNITED STATES OF AMERICA,

District of Alaska, Division No. 1, ss:

I, W. J. Hills, clerk of the United States district court for the district of Alaska, Division No. 1, do hereby certify that the above and foregoing six typewritten pages constitute a full, true, and correct copy of all the instructions and the entire charge to the jury in cause No. 336–B, United States *v.* Fred Rasmussen, as the same appear on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of this court on this the 2d day of July, 1904.

[SEAL.]

W. J. HILLS,

Clerk U. S. District Court for Div. No. 1, Alaska.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FRED RASMUSSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 51.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

SUPPLEMENTAL STATEMENT FOR THE UNITED STATES.

The status of Alaska is alluded to in the cases of *Steamer Coquitlam* v. *United States* (163 U. S., 350) and *Binns* v. *United States* (194 U. S., 486). In the former case the court decided Alaska was included in the fifteenth section of the law of March 3, 1891, providing:

> That the circuit court of appeal in cases in which the judgment of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court to be made from time to time, be assigned to particular circuits.

Mr. Justice Harlan said (p. 352):

> But we are of the opinion that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the act of 1891 upon the circuit court of appeals to review the judgments of the supreme court of any Territory assigned to such circuit by this court. That act was necessarily so interpreted by this court when, by its order of May 11, 1891 (139 U. S., 707), Alaska was assigned to the ninth circuit. Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. * * * Looking at the whole scope of the act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective Territories among the existing circuits.

In the Binns case the issue is thus stated by the court (p. 494):

> Congress has undoubtedly the power by direct legislation to impose these license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the Territory and disbursed by him solely for the needs of the Territory. Does the fact that they are ordered to be paid into the Treasury of the United States and not specifically appropriated to the expenses of the Territory, when

> the sum total of these and all other revenues from the Territory does not equal the cost and expense of maintaining its government make them unconstitutional? In other words, if, under any circumstances, Congress has the power to levy and collect these taxes for the expenses of the Territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the Territory?

In his preliminary remarks Mr. Justice Brewer said (pp. 490–491):

> It had been theretofore held by this court in *Steamer Coquitlam* v. *United States* (163 U. S., 346, 352) that "Alaska is one of the Territories of the United States. It was so designated in that order (the order assigning the Territory to the ninth judicial circuit) and has always been so regarded And the court established by the act of 1884 is the court of last resort within the limits of that Territory." Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884 (23 Stat., 24), entitled "An act providing a civil government for Alaska" provided: That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided.

In neither of these cases was the status of Alaska as regards its being an organized or unorganized Territory involved. That Alaska is a Territory is undisputed, but the Government in this case contends it is not an *organized* Territory within the meaning of section 1891, Revised Statutes. It was not necessary that Alaska should be a completely organized Territory to be included in the act of 1891 referred to in the *Coquitlam* case. As seen by the first quotation cited above the court did not regard it as necessary. The question was whether or not it was a Territory as the word is used in that act and the court held it was. Whether or not it is a completely organized Territory the court did not there consider material. In the *Binns* case the Government expressly excluded from consideration the question of Alaska's status, for in the brief of the Assistant Attorney-General he says:

> It is unnecessary to ascertain or attempt to define the precise political relations existing between the Territory of Alaska and the Federal Government. That Alaska is territory belonging to the United States is settled beyond controversy, and that Congress has plenary powers, national and municipal, Federal and State, over all the Territories, so long as they remain in a Territorial condition.

The Government conceded for the purposes of that case that Alaska might be regarded as an organized or unorganized Territory; neither does that question form any part of the issue in that case.

It is respectfully submitted whether it would not be an injustice to allow these references to prevent full and careful consideration in this case, where the issue of Alaska's status is vital. And though the court may regard Alaska as an organized Territory, speaking generally or in connection with the statutes involved in those cases, it may very properly be held not to be an organized Territory within the meaning of section 1891, Revised Statutes.

In the case *In re Lane*, referred to in the brief of the United States, the court interpreted the words "except in Territories," used in the law there involved, as meaning organized Territories, and the question whether or not Oklahoma was an organized Territory then became a direct issue in the case. The court defined an organized Territory as set forth on page 10 of the brief.

It is respectfully submitted the language of the court in the *Lane* case and the arguments in the brief for the United States, especially the fact that Alaska is still by express language deprived of a legislature and a Delegate to Congress—the two most important elements of an organized Territory, as shown by Title XXIII of the Revised Statutes—indicate clearly that Alaska is not regarded by Congress as an organized Territory over which the Constitution is extended.

CHAS. H. ROBB,
Assistant Attorney-General.

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